DAMAGES RECOVERABLE BY HUSBAND FOR INJURY TO WIFE.

Nearly everywhere now in the United States the married woman is legally entitled to industrial freedom,—freedom to buy, accumulate, and sell property, contract debts, carry on business, earn wages, and appear in the courts, all as if she were sole.

The property-title rights which the common law conferred on man, at his marriage, so far as they are inconsistent with a wife's new status, are necessarily, or in all reason should be, abrogated. He is bound upon the same conditions as in the middle ages to provide her with support, but he is no longer liable for her debts or torts.

If she, as one legally free to apply her entire time and energy to the pursuit of her own pecuniary interests, be the sole owner of her time and ability, how can it be said that she owes a legal duty to render domestic service to her husband, or that he is legally entitled to any of her time or industry?

If he possess no legal right to her industrial assistance or domestic service, upon what legal theory is a defendant who negligently disables her required to recompense the husband rather than her for the loss of her ability, or as is done in some jurisdictions, to recompense both?

Does the abolition of the feudal law under which a wife, unprotected by a marriage settlement, was held to be the chattel of her husband leave both equal in conjugal rights and duties?

If a husband may collect consequential damage other than expense of care and cure for an injury to his wife, what if anything deprives or should deprive a wife of like remedy for like injury to him?

What injury to a wife or husband is a property injury and what a personal injury?

Some of the problems arising from the married women's enabling acts have been finally settled; others, once believed to have been settled, are now in process of review and resettlement in some of the American jurisdictions.

There was no hesitation in deciding that notwithstanding the married women's enabling statutes the husband had not lost the *consortium* of his wife, from which flows his right of action against one who seduces her to commit adultery or abducts her by

force or enticement. The American courts to which this question was presented achieved a double victory: they planted more firmly than ever the Christian standard of morals; and they did this by pointing out what under common law had not been necessary to consider,—the distinction between personal service, *servitium*, and conjugal fellowship, *consortium*. The right to the former had gone because the wife was now in control of her time and labor and her husband's equal before the law, but the right to the latter could not be lost because it rested upon the unchangeable sacredness and essential oneness of the relation as the indispensable source of race integrity. Adultery, even though she were in fact the seducer, is still a rape upon her, and "the law indulges the husband with an action of assault and battery for the injury done to him".[1]

Abduction of a wife, no longer regarded as the theft of a chattel, now rests upon the same ground as adultery, and enticement is abduction by fraud.

Having shown the precise nature of *consortium* and clearly developed its fundamental mutuality, the courts were in time confronted with the demand of the wife for redress against another woman who had committed adultery with the husband, or against another person, not a paramour, who had enticed the husband to abandon or drive away his wife.

Every State in the American Union, it is believed, save three now recognizes a wife's right to her husband's *consortium*, and awards her damages against wrongdoers who deprive her of it.

The result, so plainly indicated in the United States by the elevation of the married woman to a position of legal dignity, was reached, however, only with difficulty. *Bennett* v. *Bennett*[2] is a typical instance. It illustrates the turmoil excited in the American judicial mind by the conflict between ingrained tradition and new-lighted concepts of wide-eyed civilization. In that case a married woman sued for damages against one who had enticed away her husband and deprived her of his comfort, aid, protection, and society. Vann, J., speaking for the majority, in the course of his opinion, said:[3]

"The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of

[1] Bigaouette *v.* Paulet (1878, 1881, 1883) 134 Mass. 123, 126.

[2] (1889) 116 N. Y. 584.

[3] At p. 590.

her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society unless she also has a right of action for the loss of his society? Does not the principle that "the law will never suffer an injury and a damage without a remedy" apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?"

In spite of the clarity and force of this statement the majority of the court lacked the judicial courage to rest their decision upon it.[4] They felt constrained to decide that the enabling statutes had not conferred any new substantive rights upon a wife but had merely given her a remedy in cases where before the statutes she had a right but no remedy; hence if a married woman in England, *tempore* Henry VIII, had no right to the *consortium* of her husband, then a married woman of New York in the year 1886 had no right to it, notwithstanding the enabling and equalizing statutes of the State of New York.

This postulate necessitated a demonstration that at common law a married woman did have a legal right to the *consortium* of her husband, although she had no legal power to enforce it during the continuance of the marriage.

From Bracton down to Blackstone the judges and commentators had been declaring that a wife was *sub virga viri sua,*[5] a

[4] *Cf.* opinion of Bradley, J., at p. 597, concurring in the result and *cf.* Foot *v.* Card (1889) 58 Conn. 1.

[5] Bracton, f. 414—Note Book, *pl.* 1685; Sharpe's Calendar of London Wills, i, 105.

chattel,[6] an inferior who had no property in the company, care, or assistance of the superior as the superior is held to have in those of the inferior and therefore could have no loss or injury.[7] No case could be found where a wife after the disability of coverture had ceased by death or divorce had asserted a right to damages for loss of *consortium*[8] arising during coverture. *Lynch* v. *Knight*[9] was an action of slander, brought by a wife during her husband's lifetime, in which plaintiff alleged as special damages that as a result of defendant's false words her husband turned her out of his house; and there two of the four law lords flatly ruled against a wife's right to *consortium,* while a third doubted the existence of such a right. On the other hand, cases were not infrequent where husbands after the death of the wife have maintained actions for damages for loss of *consortium.*[10]

Plaintiff prevailed in *Bennett* v. *Bennett* because the court held that at common law a wife was entitled to *consortium.*

It was the soundness of judicial instinct, and not of judicial reasoning, that led to the right result in American cases brought by wives where the sanctity of the marriage tie was involved.

The weakness of the court in *Bennett* v. *Bennett* and of the other courts[11] which adopted the same *ratio decidendi* lay in their failure to realize that the legislative enactments enlarging married women's powers were intended to leave open to women, notwithstanding marriage, a field of substantive rights coeval with that enjoyed by men; and that with nothing less than this could married women avail themselves of the economic freedom expressly given them. Equality was as incompatible with the feudal system, as servitude is with modern standards. The attempt retrospectively to construct an ancient common law remediless right upon which to base a modern woman's enjoyment of the ameliorative revolution of her own day was as futile as it was unnecessary. It was the slavery of ancient days that deprived woman of substantive

[6]Y. B. 19 Henry VI 31, *pl.* 59; 2 Rolle Abr. 546 (D).

[7]3 Bl. Comm. 143; Holmes, C. J., in Dixon *v.* Amerman (1902) 181 Mass. 430, 431.

[8]See Lush on Husband and Wife (3rd ed.) 13.

[9](1861) 9 H. L. C. 577, 599.

[10]*E. g.* Wilton *v.* Webster (1835) 7 C. & P. 198.

[11]For an interesting review and classification of the American cases, see Woolley, J., in Eliason *v.* Draper (Superior Court, Delaware, September, 1910) 25 Del. 1.

rights, just as it is the abolition of that slavery which now gives her equality before the law.

Maine[12] and New Jersey[13] alone of all the States cling to the argument, hopelessly reactionary as to premise but quite logical as to conclusion, that the statutes, being remedial only, conferred no substantive rights, and since a wife never had any *consortium* rights she has now no more power than ever to assert them. The Maine court, as if not quite sure of its earlier ground, recently adds: "We are not disposed to enlarge the range of this class of actions."[14]

The court of Tennessee in 1897 in an elaborate but specious argument undertakes to show that a married woman at common law had the substantive right to *consortium* but lacked remedy to collect damages for its violation, and then proceeds to decide that in Tennessee she has "such a right of action but [is] without remedy to assert it."[15]

In Wisconsin the legislature finally[16] solved, through an express grant to the wife of the right of recovery, the doubt created by a persistently divided court.[17]

For a good review see Professor Peck's book on Domestic Relations, Sec. 15.

In England, no right of a wife to recover in crim. con. actions ever was recognized. And by the Matrimonial Causes Act[18] the husband's action was abolished altogether, but the wronged husband is allowed to recover damages upon the granting of a decree for divorce, the damages to be applied as the court shall direct. Feudalism dies hard in England.

The American ideal of the two-sided sanctity and double unity of the marriage state is fairly illustrated in a recent case in California, in which a wife sued for and was awarded damages for loss of her husband's society, her cause of action being that the defendant had made certain false statements about the plaintiff's husband, which caused her, the plaintiff, to treat him so harshly

[12]Doe *v.* Roe (1890) 82 Me. 503.

[13]Sims *v.* Sims (1909) 77 N. J. L. 251.

[14]Morgan *v.* Martin (1898) 92 Me. 190, 192.

[15]Smith *v.* Smith (1897) 98 Tenn. 101, 107.

[16]Laws of 1905, c. 17.

[17]Duffin *v.* Duffin (1890) 76 Wis. 374; Lonstorf *v.* Lonstorf (1903) 118 Wis. 159.

[18]20 & 21 Vict. C. 85, Sec. 33.

and cruelly that he deserted her and went to parts unknown.[19] The court held that the plaintiff was defrauded of her husband's *consortium,* and intimated that the husband also had a right of action for his wife's enticement based upon the same conduct of the defendant.

A right arising from interference with the sanctity of the marriage must necessarily be a personal right. If modern thought has abolished the industrial character of a woman's relation to her husband, it has accentuated more than ever her essential oneness with him and his with her in all that pertains to the sacred purpose of the status. In one aspect, the *baron et feme* of old time have become the separate and independent man and woman who stand equal before the law; and in another aspect, the united and mutually dependent husband and wife, neither of whom the law recognizes as inferior or superior. Economically, there is no merging at all; conjugally, they are equally and completely merged, the one in the other.

Notwithstanding the legal right of a married woman in nearly all of the States to devote her time and energy, economic and industrial, to pursuits personal to herself, husbands have been and are generally being awarded consequential damages in cases where the wife received personal injuries through non-malicious torts of third persons, resulting in her industrial disability, but not at all affecting *consortium* as it is defined in the adultery and enticement cases.

(No question can be raised as to the husband's right to recover expenses of care. Indeed, the justice of this right exposes by contrast the inherent flaw in his other claims.)

Massachusetts in this respect furnishes a development of case law of extraordinary interest. In *Jordan* v. *Middlesex R. R.,* 1885,[20] it was decided that a married woman seeking damages for personal injury due to a railroad company's negligence was entitled to recover the value of her impaired ability to labor as well as for pain. Nevertheless, in *Harmon* v. *Old Colony R. R.*[21] a case similar to the Jordan case, a trial judge in 1895 excluded evidence as to the market value of the plaintiff's services, and ruled that she was not entitled to recover for the same element

[19]Work *v.* Campbell (1912) 164 Cal. 343; *Cf.* Cal. Stat. 1913, p. 217, and Moody *v.* Southern Pacific R. R. (1914) 167 Cal. 786, as to community property.

[20]Author's italics.

[21](1896) 165 Mass. 100.

of damage as a man may recover for, that she could not recover for disability to earn money or carry on business, but was entitled only to compensation for the pain she endured and the incapacity to enjoy life. The supreme judicial court, upon the consideration of the plaintiff's exceptions, carefully reviewed the enabling acts, and unanimously declared that a married woman had now become a legally distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of acquiring property; that her right to employ her time for the earning of money on her own account was as complete as his right to employ his time; that this new right might interfere with his right to and enjoyment of her society and services, but it must be deemed that the legislature intended just this; that legally the free and absolute right to dispose of her entire time and serviceability was now vested in her, to the necessary loss of her husband's former rights to service, society, and control; and this is none the less so that his obligation to support her remains unaffected. The exceptions were sustained, and a new trial ordered.

Until 1895 no one doubted the husband's right to recover for *consortium* injury in accident cases, but the Harmon case unsettled general beliefs.

Kelley v. *N. Y., N. H. & H. R. R.*[22] was tried in 1896. It was a suit by a husband to recover consequential damages arising from personal injuries to his wife occasioned by the defendant's negligence. The defendant asked the trial judge to instruct the jury that "The division of the rights to recover, which by law are made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and the damages which are to be divided between the husband and the wife should not in the aggregate exceed the damages which the wife, if unmarried, would be entitled to recover." The judge gave this instruction with the qualification that one additional element should be considered, namely, the loss of *consortium* by the husband. The judge further ruled that although the wife's time and capacity to earn were her own, yet there was a *'residuum'* to which the husband was entitled which could best be defined by the word *'consortium'*, meaning fellowship, society, or communion, for the loss of which he alone was entitled to recover. In the supreme judicial court the defendant was represented by the same attorney

[22](1897) 168 Mass. 308, 309.

who appeared for the defendant in *Harmon* v. *Old Colony R. R.* The case was argued before a bench of five judges, four of whom had sat in the Harmon case. The opinion was written by the judge who wrote the opinion in the Harmon case. The case decided that while a husband's right to compel his wife to work for him is abridged, nevertheless he still has a right to her society and assistance, that each owes to the other certain duties which are not annulled by the statutes, that these duties are included in the word *consortium,* that a husband's right to *consortium* has not been abolished, as is shown by the decision in *Bigaouette* v. *Paulet* (an adultery case, *ubi supra*).

The right of husbands to recover in negligence cases for loss of assistance and society was reaffirmed. The court further expressly declined any expression of views as to the extent of these duties or of the right of *consortium,* and whether a wife might not have a right of action for loss of her husband's *consortium.*

In 1905, a woman brought suit against another woman alleging that the defendant had debauched and carnally known the plaintiff's husband, whereby the plaintiff had lost his comfort, aid, and assistance.[23] Defendant's demurrer to the declaration was sustained. Upon plaintiff's appeal, Mr. Justice Braley, in an able and interesting opinion laid down the law to be that

"By the contract each spouse is entitled to the conjugal society and comfort of the other, and this association is one of the mutual obligations growing out of the union of husband and wife. * * * The absolute privilege of each to the conjugal society of the other must be considered as embracing the persons of both, with no distinction in favor of one as against the other, and this equal companionship and aid in the founding and maintenance of the home and in the rearing of offspring is the foundation upon which this most important of all the domestic relations rests."

The judgment of the lower court was reversed and the defendant's demurrer overruled. In this case as well as in two other cases subsequently decided,[24] it was recognized that *Kelley* v. *N. Y., N. H. & H. R. R.* had settled beyond peradventure that a husband is entitled to recover for loss of *consortium* in cases of personal injuries to his wife arising from another's negligence.

The strong intimation of the opinion in *Nolin* v. *Pearson* that both spouses now stand equal before the law in the matter of

[23]Nolin *v.* Pearson (1906) 191 Mass. 283, 286, 287.

[24]Duffee *v.* Boston Elevated Ry. (1906) 191 Mass. 563; Hey *v.* Prime (1908) 197 Mass. 474.

consortium, the unquestioned authority of the rule of *Kelley* v. *N. Y., N. H. & H. R. R.* that *consortium* rights are subject to impairment through non-malicious personal injury, led to the inevitable result that women began actions for loss of *consortium* where by accident chargeable to negligence of others their husbands were injured.

Feneff v. *N. Y. C. & H. R. R.,*[25] 1909, was such a case. The plaintiff proved that her husband had been injured physically and mentally by the defendant's negligence, that by reason of his disability she endured suffering and anxiety, was obliged to assume heavy and arduous duties which she did not have to assume before the injury, and that she lost the comfort, society, aid and assistance of her husband. She claimed the right to recover for loss of *consortium.* The supreme judicial court decided that the plaintiff could not recover. "Where there is no intentional wrong," said Knowlton, C. J., "the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the *person of another,*[26] the impairment of ability to work and be helpful and render services of any kind is paid for in full to the *person injured.*"[27] Hence, in negligence cases there can be no recovery either by husband or wife for loss of *consortium; Kelley* v. *N. Y., N. H. & H. R. R.* was overruled as bad law.

In other words the weakness of the husband's claim was exposed when a wife tried to enforce one like it. The judicial vision was not here blurred by common law preconceptions. Nor was the Massachusetts court to be deterred from pursuing the plain way of its new convictions by the fact that overruling *Kelley* v. *N. Y., N. H. & H. R. R.* was equivalent to saying that the vast aggregate of money paid as consequential damages to husbands during a half century or more had been unjustly demanded, erroneously enforced, and wrongfully received. In the case of *Bolger* v. *B. E. Ry.,*[28] decided soon after the Feneff case, a husband plaintiff upon the application of the new doctrine was required to relinquish a verdict of $1,750 *consortium* damages.

Until 1909 the bench and bar of Massachusetts had quite failed to understand the plain meaning of an important law passed by

[25]203 Mass. 278, 281.

[26]Author's italics.

[27]*Ut supra,* n. 26.

[28](1910) 205 Mass. 420.

the legislature in 1855, but when the new and true construction was announced, it was everywhere received with approval.

For fifty odd years nobody had realized that the service, wifely and motherly, which a woman gives to her husband and children in the care and maintenance of home and family was not a legal duty at all. *It was a legal right.* It was a right because the home and the children and the family are as much hers as they are her husband's. And for the impairment of the capacity voluntarily to exercise that right she and she alone is entitled to recover damages.

The atmosphere is now clear in Massachusetts. And the fog is disappearing in other States.

Connecticut has caught the spirit of clear-thinking, and the doctrine of the Feneff case has become the law of the adjoining State.[29]

Will it pass on to the great State of New York? In *Zingrebe* v. *Union Ry.*[30] the court said, "When a man, in the exercise of his inalienable right to 'life, liberty and the pursuit of happiness,' takes a wife, he becomes possessed of a vested right to her aid, comfort and society." Is New York prepared to give wives consequential damages for injuries to husbands? Reread now Vann, J.'s excellent reasoning in *Bennett* v. *Bennett,* quoted above,[31] as to the equality of husbands and wives.

In the Zingrebe case after the wife had herself received full compensation for her injuries, her husband was awarded for his injuries $7,658.91. Did he in no wise directly or indirectly share in the restoration to her, through its money equivalent, of that which by means of defendant's negligence she had lost? When she was made whole, was not he recompensed?

Apparently, by the statutes of New York a married woman may acquire property by "her trade, business, labor or services, carried on or performed on her sole and separate account"; yet according to the courts of New York the husband still retains the common law right to her household services.[32] The enabling statutes do not relieve a wife of the duty of rendering services to her husband, say the courts. "While they give her the benefit of what she earns, under her own contracts, by labor performed

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[29]Marri *v.* Stamford Street R. R. (1911) 84 Conn. 9.

[30](N. Y. 1900) 56 App. Div. 555, 557.

[31]*Supra,* pp. 123-124.

[32]Blaechinska *v.* Howard Mission and Home (1892) 130 N. Y. 497, 499.

for anyone except her husband, her common-law duty to him remains," said Vann, J., in the Blaechinska case.[33]

A married woman was not permitted to recover for her loss of ability to earn a living, although it appeared that her husband had not been living with her for twelve years and she had supported herself by cleaning and washing.[34] Compare this case with *Boggett* v. *Frier,* 11 East. 301, decided in 1809, in which it was held that a wife cannot, as a *feme sole,* maintain trespass for breaking and entering her home and seizing goods in her possession by replying in answer to a plea of coverture that her husband had four years before deserted her and gone beyond seas without leaving her any means of support, and that he had not since returned or been heard of by her; and that during all the time she had lived separate from him, and had traded and contracted as a sole trader and single woman, and as such was lawfully possessed of the dwelling house and shop in the declaration mentioned; the defendant rejoining that the husband was a natural born subject of our Lord the King, and had not abjured the realm, or been exiled, or banished, or relegated therefrom.

Boggett v. *Frier* may not be law in New York, but when a person is denied recovery for the loss of ability to earn a living because, being a married woman, the law holds her in such servitude to her husband that he is entitled to damages for her lost ability to work, as is the case not only in New York but in most of the United States,[35] it cannot be said that feudalism has perished. As Brutus remarked at Philippi,

> O Julius Cæsar, thou art mighty yet.
> Thy spirit walks abroad.

JOHN E. HANNIGAN.

BOSTON, MASS.

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[33]At p. 502.

[34]Thuringer *v.* N. Y. C. & H. R. R. (N. Y. 1893) 71 Hun. 526.

[35]See review of cases in 20 L. R. A. [N. S.] 215 and 4 A. & E. Ann. Cas. 205, and 1 Cooley, Torts (3rd ed.) 469.